No. 17-1042

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

MICHAEL D. LOOS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a voluntary national bar association whose trial lawyer members practice in every state. AAJ members primarily represent plaintiffs in personal injury suits, as well as in employment, consumer, and civil rights actions. Attorneys representing railroad workers in Federal Employers Liability Act ("FELA") actions are frequently AAJ members.

Congress has for sound reasons excluded payments on account of personal physical injury from "income" for purposes of federal income taxes. AAJ believes that for the courts to create a different rule for employment taxes or for railroad employers not only undermines the intent of Congress, but would upset settled expectations regarding the tax consequences of personal injury recoveries and make settlement agreements in FELA cases more difficult to reach.

SUMMARY OF ARGUMENT

I. The Eighth Circuit Court of Appeals correctly held in this case that Respondent's award of damages for lost income due to personal injury was not subject to withholding of railroad retirement taxes.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

Payment of Respondent's FELA judgment was not taxable "compensation" under the Railroad Retirement Tax Act. The RRTA defines compensation as money paid "for services rendered." Thus the plain text of the statute does not encompass payments for services *not* rendered due to personal injury caused by the railroad's negligence.

Indeed, the RRTA definition previously taxed payments for "time lost" including time lost due to personal injury. Congress specifically removed those provisions, making the statute unambiguous regarding congressional intent to make such payments non-taxable under the RRTA. Petitioner and the United States as amicus speculate as to the meaning of these amendments, but proffer no reliable evidence that Congress intended to impose railroad retirement taxes on FELA personal injury awards.

There is no basis to import into the RRTA the definition of "compensation" in the Railroad Retirement Act, which includes "time lost." Related statutory provisions may be construed *in pari materia* if they have the same subject matter and share the same purpose. In this instance, the RRTA defines compensation for the purpose of imposing taxes on rail workers that fund retirement benefits. The RRA defines compensation more broadly so that workers may be credited for time lost due to injury for purposes of qualifying for pension benefits. This purpose, as the Railroad Retirement Board itself recognizes, has nothing to do with taxation. Construction *in pari materia* does not support shoehorning "time

lost" back into the RRTA definition of "compensation" after Congress expressly deleted it.

Nor should this Court reinsert the term back into RRTA based on deference to the IRS interpretation of the statutory text. It is true that the accompanying Treasury regulation has long included "time lost" in its interpretation of RRTA compensation. But payments for "time lost" include a variety of types of remuneration. Only payments for past wages lost on account of personal injury are disputed. Crucially, the Treasury regulation omits reference to personal injury, which had been part of the statutory definition until deleted by Congress. The IRS appears to have set out its current view only in litigation in amicus briefs. Deference to that position is not warranted.

To the extent that the RRTA definition of taxable "compensation" is at all ambiguous, this Court should be guided by the well-settled cannon of construction of tax statutes in favor of the taxpayer.

II. An alternate and more direct answer to the question presented in this case is that, regardless of whether Respondent's FELA award is "compensation," it is not subject to railroad retirement taxes because it is not "income" as defined by the Internal Revenue Code.

Although Congress cast a wide net in imposing a tax on "income," Congress also legislated specific exemptions from that category, including pay-

ment of tort damages "on account of personal physical injuries." 26 U.S.C. § 104(a)(2). This exclusion includes awards for lost income due to injury, and it has remained so through a number of amendments to the section.

It is true that this exclusion is set out in the portion of the Code relating to federal income taxes. But Tier 1 and Tier 2 retirement taxes under the RRTA are also "imposed on the income" of employees. Petitioner proposes that Congress, *sub silentio*, intended different meanings for the basic term "income" in different portions of the tax code. That suggestion is made more improbable by the fact that following enactment of the RRTA in 1937 thousands of on-the-job railroad injuries have occurred each year involving time lost from work. Yet, conventional practice has treated FELA awards for lost wages as not subject to RRTA taxes. Congress took no action to correct what Petitioner argues was erroneous application of the statute. In fact, no suggestion that FELA awards might be subject to RRTA taxes appeared in any court opinion until a district court rejected such an argument in 2012.

The more sensible construction would be that Congress intended "income" to carry the same meaning, including the same exclusions, for both income tax and employment taxes, including the RRTA retirement taxes. Such a construction would be consistent with the intent of Congress in enacting this exclusion: To relieve the taxpayer who has received wrongful physical injury of the burden of tax liability for tort awards for income lost due to that injury.

This construction is also consistent with the non-tax treatment of injury awards by the other major federal employment tax, the Federal Insurance Contributions Act ("FICA") tax, which funds Social Security benefits. It is well-settled among the courts, and acknowledged by the IRS, that tort recoveries for lost wages on account of personal injury are not subject to FICA taxes. The policy that underlies that rule, the administrative convenience of defining identical terms in the tax code identically, also supports the interpretation of "income" for RRTA purposes identically to "income" for federal income tax purposes.

This Court should hold, in accordance with the well-reasoned decisions by the majority of courts to have addressed this issue, that FELA personal injury awards for past lost wages, even if deemed compensation under RRTA, are nonetheless not taxable because they are excluded from "income."

III. Permitting railroads to withhold RRTA taxes from FELA awards for past lost wages undermines the beneficial congressional purpose served by FELA and impedes fair settlements of FELA claims that involve lost wages. Congress enacted the FELA in response to widespread on-the-job injuries and deaths among rail workers. By establishing a statutory negligence cause of action, Congress intended both to provide compensation for wrongfully injured workers and their families, and to provide a financial incentive for railroads to invest in safe work places for their employees. Although railroading is now safer, workers still face serious risks of harm in

the workplace. A rule subjecting FELA awards to RRTA tax will diminish the net compensation recoverable by injured claimants.

Trial lawyers who represent injured rail employees and their families are also concerned that railroad defendants will weaponize such a rule to obtain unfair advantage in settlement negotiations. At the outset, it is clear that a rule allowing a FELA defendant to deduct RRTA taxes from a judgment entered upon a jury verdict does not financially advantage the defendant. Amounts withheld must be remitted to the IRS, along with the railroad's own RRTA contribution. Petitioner and amicus Association of American Railroads ("AAR") contend that such a taxability rule is needed to maintain a reliable and stable source of funding for the railroad retirement system. There is no indication that the current non-taxability rule has undermined the system's viability.

But most FELA claims are settled. The rule sought by Petitioner will arm railroads with a potent weapon for use in settlement negotiations with injured workers. Under that rule, where all or part of a verdict award would be subject to RRTA taxes, the railroad can reduce its settlement offer by proposing to allocate little or none of the settlement amount to lost past income. The parties' allocation of settlement proceeds generally dictates the tax consequences. In this manner, the railroad will be able to extract a lower settlement than it might otherwise obtain through negotiations, including settlements following a jury verdict. At the same time, such a

settlement avoids payment of Tier 1 and Tier 2 taxes both the plaintiff and the employer. Consequently, the only beneficiaries of the taxability rule Petitioner seeks are Petitioner and other railroads facing negligence actions under FELA.

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT AN AWARD OF DAMAGES FOR PERSONAL INJURY, INCLUDING LOST WAGES, IS NOT "COMPENSATION" TAXABLE UNDER THE RAILROAD RETIREMENT TAX ACT.

AAJ addresses this Court on the sole issue in this case: Whether Plaintiff's FELA award of damages for lost income due to personal injury is subject to the Railroad Retirement Tax Act ("RRTA"), 26 U.S.C. §§ 3201-3233.

AAJ believes that the Eighth Circuit was correct in holding that "compensation" paid "for services rendered" under RRTA does not include payment to Michael Loos for services not rendered due to his wrongful injury. AAJ also believes, and will demonstrate in Part II, that even if the award may be deemed RRTA "compensation," it is not taxable because it is excluded from gross income under 26 U.S.C. § 104(a)(2).

A. The Plain Text and Legislative History of the RRTA Establishes Congress's Intent to Exclude Damages Awarded for Lost Wages on Account of Personal Injury.

Petitioner frames the "threshold issue before this Court [as] whether the RRTA's definition of taxable compensation includes pay for time lost." Pet. Br. 17. The plain text of the statute yields a clear answer.

The RRTA defines "compensation" as "any form of money remuneration paid to an individual *for services rendered as an employee* to one or more employers." 26 U.S.C. § 3231(e)(1) (emphasis added). Contrary to Petitioner's assertion, the payment to Michael Loos does not "fit comfortably within this definition." Pet. Br. 17. That payment was not for services rendered, but in satisfaction of a judgment debt entered by the district court following the jury's verdict against BNSF. That verdict and judgment did not compensate Loos for an amount owed for services rendered, but for the amount Loos was unable to earn because he could not perform his job due to BNSF's negligence. The court properly found that payment for services not rendered does not fit well within the definition of compensation for services rendered. *See* Pet. 20a.

Importantly, the RRTA originally made provision in its definition of compensation for "time lost," including time away from active service due to personal injury.[2] Congress specifically stripped out

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[2] RRTA formerly provided:

those provisions by amendments in 1975 and 1983. *See* U.S. Br. 6-9. The court below accurately found from both the plain text and this legislative history that "the RRTA is unambiguous and does not include damages for lost wages within the definition of 'compensation.'" Pet. 24a. It is highly improbable that Congress would have removed references to "time lost" due to personal injury from the definition of RRTA compensation, all the while secretly and silently intending to keep such "time lost" as part of the definition.

Both Petitioner and the United States expend considerable effort and ink to fill that silence. *See*

> (1) The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, *including remuneration paid for time lost* as an employee . . .
>
> (2) A payment made by an employer to an individual through the employer's payroll shall be presumed, in the absence of evidence to the contrary, to be compensation for service rendered by such individual as an employee of the employer in the period with respect to which the payment is made. An employee shall be deemed to be paid "for time lost" the amount he is paid by an employer with respect to an identifiable period of absence from the active service of the employer, *including absence on account of personal injury* . . .

26 U.S.C. § 3231(e)(1)-(2) (1970) (emphasis added).

Pet. Br. 18-23; U.S. Br. 16-20. They accomplish little more than describing what is facially obvious: that Congress "removed the last references to pay for time lost in the RRTA's definition of compensation" and "Congress inserted in its place rules about payments in excess of base compensation." Pet. Br 8. *See also* U.S. Br. 25 (speculating that the amendments "were part of a series of changes to shift RRTA taxation from a when-earned to a when-paid basis.") Neither Petitioner nor the United States offers any reliable indicator of Congress's intent in deleting provisions relating to time lost and personal injury. They certainly point to no evidence of congressional intent to impose railroad retirement taxes on FELA personal injury awards.

B. The Definition of "Compensation" in the Railroad Retirement Act Does Not Alter the Definition Congress Set Out in the RRTA.

Remarkably, Petitioner insists in the face of those statutory amendments that "the RRTA is unambiguous in including pay for time lost within taxable compensation." Pet. Br. 34. The United States, for its part, concedes that "compensation" is "an ambiguous term" in the statute. U.S. Br. 22. Both, however, seek to borrow from the definition of compensation set out in the Railroad Retirement Act, 45 U.S.C. § 231 ["RRA"], to reinsert "time lost" back into the RRTA definition. The RRA defines "compensation" as:

> [A]ny form of money remuneration paid to an individual for services rendered as an employee to one or more employers or as an employee representative, including remuneration paid for time lost as an employee . . .

45 U.S.C. § 231(h)(1).

Petitioner and the United States propose that this Court invoke the canon that "related statutory provisions should be construed *in pari materia*" to import "time lost" back into the RRTA definition of "compensation." U.S. Br. 20; *see* Pet. Br. 25.

Courts resort to this interpretive canon cautiously, recognizing that they look beyond the four corners of the legislation Congress had before it. Construction *in pari materia* is not appropriate where statutes are simply "related." Rather, one statutory provision can take meaning from another only where they are "statutes addressing the same subject matter" that may fairly be read "as if they were one law." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006); *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). *See also* 2B Sutherland Statutory Construction § 51:3 (7th ed.) (The most important characteristic of statutes that may be read *in pari materia* is that they "have the same purpose or object.").

The statutes at hand, however, address entirely different subjects and aim to accomplish different objectives. The RRTA is administered by the

IRS to collect taxes that will fund railroad retirement benefits. By contrast, Congress in the Railroad Retirement Act, 45 U.S.C. § 231, established the Railroad Retirement Board to disburse benefits from the retirement account and to determine whether an employee has met the requirements for benefit eligibility. Among those requirements, an employee must be credited with 360 months of service to qualify for the maximum pension benefit. See 45 U.S.C. § 231a & § 231f. In making that calculation, the Board looks to compensation received by the employee for identifiable time periods. *See* Railroad Retirement Information Pamphlet, Dated May 2008, Joint Appendix ("JA") 65a-66a. The Board's responsibility has nothing to do with assessing taxes, and its definition of "compensation" may for valid reasons differ from the IRS's. For example, as the Board has explained, giving broader scope to "compensation" may benefit the employee who has been injured by providing "additional months of creditable service needed to qualify for railroad retirement benefits." *Id.* at 64a.

In addition, the Railroad Retirement Board has made clear that the fact that compensation is creditable for pension purposes does not necessarily mean it is taxable for RRTA purposes. To the contrary, "[t]here are circumstances where pay for time lost may be fully creditable under the Railroad Retirement Act, but taxable only to a limited extent, or not taxable at all, under the Railroad Retirement Tax Act." U.S. R.R. Retirement Bd., *Pay For Time Lost From Regular Work*, 10 (2017), *available at* https://www.rrb.gov/Benefits/IB-4.

It is therefore wholly inappropriate to attempt to use the RRA's broad non-tax definition of compensation in order to resolve taxability questions under the RRTA. Petitioner's facile assertion that the two statutes are merely "different sides of the same coin," Pet. Br. 25, is unconvincing. "Courts routinely find that several acts treating the same subject, but having different objects, are not *in pari materia*." Sutherland, *supra*, at § 51:3.

Tellingly, Petitioner itself argues that "where Congress had previously defined compensation as 'active service' but dropped this requirement from the statute in 1937," the court may not read that phrase back into the law. Pet. Br. 21. By the same token, the Eighth Circuit properly declined to shoehorn "time lost" back into the RRTA definition of "compensation" after Congress had explicitly removed it. Pet. 23a-24a.

C. The IRS Regulation Is Not Entitled to Deference in this Case.

Petitioner and the United States as amicus argue that, even if this Court determines that 26 U.S.C.A. § 3231(e)(1) does not unambiguously include Michael Loos's lost wages in the definition of compensation, this Court should give great deference to the accompanying IRS regulation.[3] Pet. Br. 34-37; U.S. Br. 33-34.

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[3] "The term compensation is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer . . ." 26 C.F.R. § 31.3231(e)-1(a)(3).

Petitioner emphasizes that for many years "the IRS has maintained that compensation does not require active service," despite Congress's multiple amendments to the RRTA's definition of compensation. Pet. Br. 35-36. That regulation, however longstanding, does not clearly state that the IRS interprets the definition of compensation to include personal injury awards for lost income.

Neither Petitioner nor the United States has identified an IRS regulation that specifically interprets RRTA "compensation" to include such damages. Indeed, the phrase "including absence on account of personal injury," which was present in the statutory definition until removed by Congress, *see* footnote 2, does not appear in the IRS regulation at all. No amount of deference to the agency's regulation supports incorporating time lost payments for personal injury into the RRTA definition of compensation where the regulation itself has conspicuously omitted "on account of personal injury."

Petitioner points to a 1961 revenue ruling in which the IRS held that a FELA award for personal injuries was not subject to federal income tax, including the amount awarded for lost wages. Pet. Br. 43-44. In the last sentence, the IRS stated, "The fact that in this case 'time lost payments' constitute compensation for the purposes of taxes imposed by the Railroad Retirement Tax Act is not controlling for Federal income tax purposes." Rev. Rul. 61-1, 1961-1 C.B. 14, 1961 WL 12630 (1961). This single sen-

tence appears only in a revenue ruling, not a regulation. It was not responsive to the taxpayer's query, nor did it state directly that a FELA award for lost wages is taxable, and it was not supported by any analysis or authority.

In fact, seven years thereafter, the IRS ruled that payments made solely in consideration for a "personal injury release" which releases a railroad from liability "are not remuneration for 'time lost' within the meaning of the Railroad Retirement Tax Act and, therefore, are not compensation for purposes of the taxes imposed by that Act." Rev. Rul. 68-416, 2 C.B. 473 (1968). Thus, even when the RRTA previously included "pay for time lost," the IRS recognized that a railroad's payment in exchange for a release from liability is not taxable compensation under the RRTA. *Id.* By the same reasoning, a payment to satisfy a FELA judgment is likewise not taxable under the RRTA.

In fact, the IRS appears to have arrived at its current position only in 2013, when the government filed amicus briefs in support of the railroad in *Heckman v. BNSF Ry. Co.*, 837 N.W. 2d 532 (Neb. 2013) and in *Mickey v. BNSF Ry. Co.*, No. ED98647, 2013 WL 2489832 (Mo. Ct. App. June 11, 2013), arguing in favor of imposing railroad retirement taxes on FELA awards for lost income.

In these circumstances, the IRS view warrants no deference.

D. To the Extent the RRTA Definition of Compensation is Ambiguous, this Court Should Construe the Provision in Respondent's Favor.

If this Court should determine that the RRTA definition of "compensation" is ambiguous with respect to the taxability of FELA awards, this Court should look to "the traditional canon that construes revenue-raising laws against their drafter." *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (U.S. 2001) (Thomas, J., concurring). *See also Hassett v. Welch*, 303 U.S. 303, 314 (1938) (ambiguity in the meaning of a revenue-raising statute should be resolved in favor of the taxpayer); *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 350 (1927) ("The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers."); *United States v. Merriam*, 263 U.S. 179, 188 (1923) ("If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.").

It is also well-settled that "the courts have been liberal in construing Congressional enactments intended to give tax relief to injured or sick employees." *Andress v. United States*, 198 F. Supp. 371, 376 (N.D. Ohio 1961) (internal quote omitted) (construing exclusion of wage continuation payments under then-existing 26 U.S.C. §105(d)). Applying that rule of construction in this case, this Court should uphold the ruling by the Eighth Circuit that Michael Loos's FELA award for past lost income is not taxable compensation under the RRTA.

II. DAMAGES AWARDED IN FELA ACTIONS ON ACCOUNT OF PHYSICAL INJURY ARE NOT "INCOME" AND THEREFORE NOT SUBJECT TO EMPLOYMENT TAXES, INCLUDING RAILROAD RETIREMENT TAXES.

With due respect to Albert Einstein,[4] the tax question in this case may be answered directly and fairly easily with the words Congress used in defining the scope of "gross income." The district court below held that because Congress has excluded Loos's award for lost wages from gross income, the award cannot be viewed as "compensation" subject to RRTA taxation: "[W]hen an award is received for a personal injury in a tort or tort-type proceeding, the whole award is excludable from income under 26 U.S.C. § 104(a), even if included in the award is an amount for lost earnings." Pet. 30a (quoting *Cowden v. BNSF Ry. Co.*, No. 4:08CV01534, 2014 WL 3096867, at *11 (E.D. Mo. July 7, 2014)).

A. The plain text of both 26 U.S.C. § 104(a)(2) and 26 U.S.C. § 3201, read together, support the exclusion of awards for lost wages from both federal income tax and federal employment taxes, including RRTA taxes.

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[4] "The hardest thing in the world to understand is the income tax." The Macmillan Book of Business and Economic Quotations 195 (Michael Jackman ed. 1984).

When Congress declared that "gross income means all income from whatever source derived,"[5] it cast a very wide net. *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 429-30 (1955). Indeed, this Court has stated that by use of that phrase Congress intended "to use the full measure of its taxing power." *Helvering v. Clifford*, 309 U.S. 331, 334 (1940). But Congress also expressly excluded specified items from that definition, including tort damages received "on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a)(2).[6]

This Court has further instructed that "recovery for lost wages is also excludable as being 'on account of personal injuries,' as long as the lost wages

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[5] "General definition.--*Except as otherwise provided* in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

> (1) *Compensation for services*, including fees, commissions, fringe benefits, and similar items; . . ."

26 U.S.C.A. § 61(a)

[6] "(a) In general . . . gross income does not include-- . . .

> (2) . . . any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness; . . ."

26 U.S.C. § 104(a)(2). To be excludable under this section, payment must be received "through the prosecution of an action or the settlement entered into in lieu of prosecution of an action based upon tort or tort-type rights." *Pipitone v. United States*, 180 F.3d 859, 862 (7th Cir. 1999).

resulted from time in which the taxpayer was out of work as a result of her injuries." *Comm'r v. Schleier*, 515 U.S. 323, 329 (1995). There is no question that Michael Loos's personal injury award, including the $30,000 awarded for past lost wages, is excluded from the definition of "gross income" for federal income tax purposes. AAJ submits that amounts which are not income for purposes of income tax are also not taxable income for purposes of federal employment taxes, including RRTA taxes.

Petitioner and the United States argue to this Court that this exclusion from "income" under § 104(a)(2) is irrelevant to this case because "the RRTA tax is imposed on 'compensation'—a defined term in the RRTA." Pet. Br. 12. *See also id.* at 39 ("Rather than relying upon 'gross income,' the RRTA and RRA use the term 'compensation.'"); U.S. Br. 2 ("[T]o fund the retirement benefits, the RRTA imposes a tax on railroad workers' 'compensation.'"); *id.* at 31 ("The RRTA taxes 'compensation.'"). Amicus AAR similarly asserts, "The RRTA imposes separate payroll taxes on 'compensation' paid by railroad employers and received by railroad employees." AAR Br. 8 (citing 26 U.S.C. §3201(a) & (b)).

To the contrary, under the RRTA, both Tier 1 and Tier 2 taxes are "*imposed on the income* of each employee." 26 U.S.C. § 3201(a) & (b) (emphasis added).[7] As this Court recently observed, "Congress

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[7] (a) Tier 1 tax.--In addition to other taxes, there is hereby *imposed on the income* of each employee a tax equal to the applicable percentage

adopted the Railroad Retirement Tax Act of 1937. . . . Under the law's terms, private railroads and their employees pay a tax based on employees' *incomes*. *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2068 (2018) (emphasis added). The fact that the tax is measured as a percentage of the employee's compensation, 26 U.S.C. § 3201, and collected by "deducting the amount of the taxes from the compensation of the employee," 26 U.S.C. § 3202(a), does not alter the fact that the railroad retirement taxes, like the federal income tax itself, is imposed on the taxpayer's income.

The personal-injury exclusion currently found at 26 U.S.C. § 104(a)(2) dates back to § 213(b)(6) of the Revenue Act of 1918. *See* 40 Stat. 1057, 1066 (1919). Congress has revisited and amended § 104(a)(2) several times in recent decades. Congress

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> of the compensation received during any calendar year by such employee for services rendered by such employee. . . .
>
> (b) Tier 2 tax.--In addition to other taxes, there is hereby *imposed on the income* of each employee a tax equal to the percentage determined under section 3241 for any calendar year of the compensation received during such calendar year by such employee for services rendered by such employee.

26 U.S.C.A. § 3201 (emphasis added). Significantly, these subsections make clear that the tax is equal to a percentage of compensation received by the employee "for services rendered." The IRS regulation similarly provides, the RRTA "tax is measured by the amount of compensation received *for services rendered* as an employee. 26 C.F.R. § 31.3201-1 (emphasis added).

amended the section in 1983 to include periodic payment settlements. Pub. L. No. 97-473, 96 Stat. 2605, § 1605(b). In 1989, Congress limited the excludability of punitive damages. Pub. L. No. 101-239, 103 Stat. 2106, § 7641(a). Further amendments in 1996 removed punitive damages from the exclusion entirely, added the requirement that injuries or sickness be "physical," and provided that emotional distress shall not be treated as a physical injury or physical sickness. Pub. L. No. 104-188, 110 Stat. 1755, § 1605(a) & (b). Yet, Congress has not countermanded the judicial construction of § 104(a)(2) as encompassing damages for lost wages on account of personal physical injury.

The argument advanced by the United States, that "statutory carve-outs from 'gross income' under the income-tax laws . . . are irrelevant under the RRTA," U.S. Br. 31, violates the plain meaning of the statutory text. "Income" is undeniably a broader term than "compensation." Section 61(a) of the Internal Revenue Code explicitly provides that compensation is a subcategory of income, *see* footnote 6. Moreover, this Court has described "income" in §61(a) as encompassing the broadest possible reach of Congress's taxing power. *Helvering*, 309 U.S. 331. The IRS itself has indicated that § 104(a)(2) is highly relevant to RRTA taxability. In 1996, after Congress amended § 104(a)(2) to exclude only damages received on account of personal *physical* injuries, the IRS issued a revenue ruling stating that back-pay damages received in an employment discrimination suit were no longer excludable from gross income un-

der § 104(a)(2) and therefore qualified as compensation for Railroad Retirement Tax purposes. Rev. Rul. 96-65, 1996-2 C.B. 6 (1996). This ruling suggests that the IRS understands compensation is a subset of income and that §104(a)(2) applies to RRTA taxes imposed on income.

Petitioner and the government ask this Court to hold for the first time that Congress intended different meanings for the basic term "income" in various portions of the Internal Revenue Code. And Congress did so, they contend, without leaving behind the least hint for taxpayers in the hearings, legislative reports or commentary.

Petitioner's statutory construction is rendered even more improbable by its insistence that RRTA taxation of FELA awards for lost wages has actually been the correct interpretation since the enactment of the RRTA in 1937. Pet. Br. 39-41; U.S. Br. 30-31.

As AAR indicates, each year sees thousands of potential FELA personal injury claims that include claims for loss of income. *See* AAR. Br. 5-6 (noting "an annual average of 2,983 on-duty injuries resulting in time away from the job"). Yet, for approximately 75 years following the enactment of the RRTA, "the question of whether railroad employers could withhold payroll taxes from awards to injured workers did not appear in court decisions prior to the 2012 decision." Thomas R. Ireland, *A New Class of Hybrid-Tort Actions Based on Recent FELA Deci-*

sions, 21 J. Legal Econ. 67, 68-69 (2014) (citing *Windom v. Norfolk Southern Railway Co.*, No. 5:10-CV-407, 2012 WL 6096990 (M.D. Ga. Dec. 7, 2012)). In *Windom*, the court rejected Norfolk Southern's argument that FELA awards were subject to retirement taxes.[8] *See also* Declaration of Michael P. McReynolds, JA27a ("In the hundreds of cases I have been involved with, BNSF and other railroads agreed that FELA verdicts and settlements, were not taxable under the Internal Revenue regulations and the Railroad Retirement Tax Act.").

Petitioner asks this Court to assume that Congress intended to subject FELA lost income awards to RRTA taxes. The more sensible interpretation is that Congress intended "income" to have the same meaning, including exclusion for amounts received on account of personal injury, for both the income tax and the railroad retirement tax.

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[8] In *Norfolk & W. Ry. Co. v. Chittum*, 468 S.E.2d 877, 882 (Va. 1996), the railroad raised the distinct but similar argument that in calculating the FELA plaintiff's lost wages the trial court should have subtracted his Tier 1 and Tier 2 retirement payments. The court rejected the argument, stating, "N & W has not cited, and we have not found, a single FELA decision from either a federal or a state court holding that such retirement payments should be deducted from gross income in calculating net income." *Id.* at 882.

B. Exclusion of awards for lost income from both federal income tax and federal employment taxes, including the RRTA, supports the policy underlying § 104(a)(2).

The modern rationale for the exclusion from income of amounts received on account of personal injury is based on "Congress' sympathy for the victims of personal injuries." *Dotson v. United States*, 87 F.3d 682, 687 (5th Cir. 1996). Justice Black, writing for the Court in *Haynes v. United States* explained that, in keeping the exclusion, Congress undoubtedly "intended to relieve a taxpayer who has the misfortune to become ill or injured, of the necessity of paying income tax" on payments received on account of those harms. 353 U.S. 81, 84-85 n.3 (1957) (quoting *Epmeier v. United States*, 199 F.2d 508, 511 (7th Cir. 1952)).

Congress clearly recognized that a "societal purpose would be served by benefiting innocent victims of tortious conduct." *Huddell v. Levin*, 395 F. Supp. 64, 87 (D.N.J. 1975), vacated on other grounds, 537 F.2d 726 (3d Cir. 1976). Lawmakers therefore made "a considered decision" that "damages recoverable for loss of earnings [be] expressly excluded from gross income." *Id.* at 88 n.33 (internal quotation omitted). Consequently, courts widely view the provision as expressing the "clear intent on the part of Congress to confer a benefit upon an injured party by making his recovery tax-free." *Louissaint v. Hudson Waterways Corp.*, 443 N.Y.S.2d 678, 682 (N.Y. Sup. Ct. 1981). *See also Roemer v. Comm'r*,

716 F.2d 693, 696 n.2 (9th Cir. 1983) (the § 104(a)(2) exclusion reflects the "compassion" of Congress); *Hall v. Chicago & Nw. Ry. Co.*, 125 N.E.2d 77, 86 (Ill. 1955) (the provision reflects congressional intent "to give an injured party a tax benefit").

For this reason, while "it is generally true that statutes allowing deductions from gross income are strictly construed," courts "have been liberal in construing Congressional enactments intended to give tax relief to injured or sick employees." *Andress v. United States*, 198 F. Supp. 371, 376 (N.D. Ohio 1961) (internal quotation omitted).

C. The Non-Taxability of Plaintiff's Award for Lost Income on Account of Personal Injury under the RRTA Is Consistent with the Non-Tax Treatment of Personal Injury Awards Under FICA Employment Taxes.

It is well-settled that personal injury awards that are excluded from income for income tax purposes by § 104(a)(2) are also excluded from federal employment taxation for Social Security purposes.

This Court in *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981), set forth the basic principle that Congress intended "wages" to have the same meaning for income tax and employment tax withholding. The taxpayer-employer in that case provided meals and lodging for its workers on oil rigs. The IRS acknowledged that these expenditures were excluded from the workers' income

and thus were not wages subject to income tax withholding under I.R.C. § 3402(a). *See Rowan*, 452 U.S. at 250-51. However, IRS regulations categorized the meals and lodging as "wages" for purposes of FICA employment tax withholding. *Id.* at 252. Justice Powell, writing for the Court, stated:

> Congress intended . . . to coordinate the income-tax withholding system with FICA and . . . did so to promote simplicity and ease of administration. Contradictory interpretations of substantially identical definitions do not serve that interest. It would be extraordinary for a Congress pursuing this interest to intend, without ever saying so, for identical definitions to be interpreted differently.

Id. at 257. In addition, the Court held that the "plain language and legislative histories of the relevant Acts indicate that Congress intended its definition to be interpreted in the same manner for FICA . . . as for income-tax withholding." *Id.* at 263. The treasury regulations, which employed multiple definitions of "wages," undermined the congressional aims of "simplicity and ease of administration" and were therefore invalid. *Id.*

Relying on *Rowan*, every federal circuit court of appeals to address the issue has held that personal injury damages that are excluded from gross income under § 104(a)(2) are also not subject to FICA payroll taxes. In *Dotson v. United States*, 87 F.3d

682, 689 (5th Cir. 1996), the Fifth Circuit held, on the basis of *Rowan*, that the "portion of the [personal injury] settlement determined to be excludable from taxable income on remand to the district court should also be excludable from wage taxes." *See also Gerbec v. United States*, 164 F.3d 1015, 1025-26 (6th Cir.1999) (similar); *Redfield v. Ins. Co. of N. Am.*, 940 F.2d 542, 548 (9th Cir. 1991) (age discrimination damages that were excludable from income under the then-existing § 104(a)(2) "are simply not 'income' as used in the FICA statutes.").

This Court recently reaffirmed *Rowan* in *United States v. Quality Stores, Inc.*, 572 U.S. 141 (2014). That case did not involve personal injury awards, but rather FICA withholding on supplemental unemployment compensation benefits. Justice Kennedy, writing for the Court, emphasized, "What is of importance is the major principle recognized in *Rowan*: that simplicity of administration and consistency of statutory interpretation instruct that the meaning of 'wages' should be in general the same for income-tax withholding and for FICA calculations." *Id.* at 155. This same major principle compels the conclusion in this case that the meaning of "income" should be the same for the purposes of federal income tax withholding and for federal employment taxes, which include RRTA taxes.

Petitioner in fact concedes that "FICA does not tax an award for time lost due to personal injury." Pet. Br. 47 (quoting *Liberatore v. Monongahela Ry. Co.*, 140 A.3d 16, 30 (Pa. Super. 2016)). *See also* AAR Br. 17 (similar). The IRS as well agrees

that "payments on account of personal injury are not taxable under FICA." U.S. Br 32.[9] *See* Office of Chief Counsel, IRS Memo., *Income and Employment Tax Consequences and Proper Reporting of Employment-Related Judgments and Settlements*, p.8 (Oct. 22, 2008), www.irs.gov/pub/lanoa/pmta2009-035.pdf. ("If not income, then not wages. Amounts excludable from gross income under §104(a)(2) . . . are not wages for FICA and income tax withholding purposes."). More recently, the IRS issued a private letter ruling that wage continuation payments to police and firefighters for injuries in the course of employment were excluded from gross income under §104(a)(1) and therefore are not subject to withholding for both federal income tax and FICA tax. IRS, Priv. Ltr. Rul. 2012-10-012, 2012 WL 756551 (Mar. 9, 2012).

There is no sound basis for defining an award for lost wages as not income for federal income tax purposes and not taxable for FICA purposes, but taxable income for purposes of the RRTA. Treasury regulations provide that the term "compensation" for purposes of the RRTA has the same meaning as

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[9] The government's current view is that the decisions in *Gerbec*, *Redfield* and *Dotson*, as well as its own prior view in this case, that receipts excluded from income tax under § 104(a)(2) are also excluded from FICA taxes, are erroneous. U.S. Br. 32. The government's new position not only upends the settled expectations of perhaps thousands of successful FELA claimants, but of perhaps hundreds of thousands of plaintiffs who receive verdicts or settlements of tort causes of action for personal injury. It should go without saying that such an unexpected reversal of settled law amounts to a substantial tax increase that is the sole responsibility of the legislative branch.

the term "wages" in FICA." 26 C.F.R. § 31.3231(e)-1(a)(1).

The majority of courts to have addressed this issue have arrived at the similar conclusion that FELA awards for lost wages are not subject to RRTA tax and withholding because they are excluded from "income" by § 104(a)(2). As the Supreme Court of Missouri stated,

> "[C]ompensation" received as a part of a personal injury judgment is not subject to RRTA withholding taxes for the same reason that lost wages received as part of a personal injury judgment are not subject to FICA withholding taxes. . . . [A] payment that does not qualify as income [under § 104(a)(2)] cannot qualify as wages.").

Mickey v. BNSF Ry. Co., 437 S.W.3d 207, 212 (Mo. 2014) (en banc), *See also Loy v. Norfolk S. Ry. Co.*, No. 3:12-CV-96, 2016 WL 1425952, at *5 (N.D. Ind. Apr. 12, 2016) ("Loy's entire jury award is based on his physical injury and is excludable from RRTA withholdings under § 104(a)(2)."); *Marlin v. BNSF Railway Co.*, 163 F. Supp. 3d 576, 582 (S.D. Iowa 2016) (because wages are a subset of income, plaintiff's jury award "is excludable from RRTA withholdings under § 104(a)(2)."); *Cowden*, 2014 WL 3096867, at *12 (Award in a FELA action "is excluded from 'income' in whole under 26 U.S.C. § 104(a)(2)" and therefore is not subject to RRTA withholding.); *Cf. Munoz v. Norfolk S. Ry. Co.*, 2018 IL

App (1st) 171009, 2018 WL 2728696, at *7 (Ill. App. Ct. June 5, 2018) (holding "Munoz's FELA award is not subject to withholding under the RRTA" but not reaching its excludability under § 104(a)(2)).

Three decisions have held to the contrary. The courts in *Phillips v. Chicago Cent. & Pac. R.R. Co.*, 853 N.W.2d 636, 652 (Iowa 2014) and *Heckman v. BNSF Ry. Co.*, 837 N.W.2d 532, 543 (Neb. 2013), held that FELA awards may be classified as "compensation" and subject to RRTA taxes. Neither court considered whether such awards were nonetheless not taxable because not income under § 104(a)(2). The superior court in *Liberatore v. Monongahela Ry. Co.*, No. 1011-EDA-2015, 2016 WL 1381861, at *12 (Pa. Super. Ct. Apr. 7, 2016) held that the plaintiff's award was subject to RRTA taxes despite § 104(a)(2).

AAJ submits that the reasoning followed by the majority of courts is based on both reasoned statutory construction and sound policy.

III. PERMITTING RAILROADS TO WITHHOLD RRTA TAXES ON FELA AWARDS FOR LOST WAGES WILL IMPEDE FAIR SETTLEMENTS OF FELA CLAIMS.

A. Congress Intended FELA to Provide Fair Compensation to Injured Workers and Financial Incentive for Railroads to Invest in Workplace Safety.

Railroading has always been dangerous. "In the second half of the nineteenth century, the United States experienced an accident crisis like none the world had ever seen and like none any Western nation has witnessed since." John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 694 (2001). The rates of death and serious injury to railroad workers were "astronomical." Every year, one in every 300 railroad workers was killed on the job. Walter Licht, *Working For The Railroad: The Organization of Work in the Nineteenth Century*, 124-29 (1983). In 1908 alone, 281,645 railroad workers were injured or killed on the job. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691 (2011).

In that year, Congress enacted the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, to give railroad workers a statutory negligence cause of action for personal injury with the right to a jury trial. Congress took this step firmly convinced that the "only manner in which [railroads] can be persuaded to take reasonable care of their employees is by holding them responsible in damages for the absence of such care." 40 Cong. Rec. 4605 (1906). *See also McBride*, 564 U.S. at 690-93; *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542-43 (1994).

These days railroading is far safer, but workers still face dangerous conditions. There continue to be collisions and derailments. Workers continue to suffer serious injury from rolling railcars and moving machinery in the train yards. Asbestos and toxic

solvents cause deadly harm to repair and maintenance workers. Brakemen suffer disabling knee and back injuries caused by years of walking track beds filled with uneven ballast. This Court has recognized its duty to preserve the statutory cause of action Congress has created. *Gottshall*, 512 U.S. at 543 ("We have liberally construed FELA to further Congress' remedial goal.").

Reversal in this case, and this Court's holding that FELA awards for lost income are subject to withholding of railroad retirement taxes, will diminish the compensation FELA claimants can recover. However, what also causes concern among trial lawyers who represent injured rail employees and their families is the railroads' hidden purpose in this and other cases. A defendant found liable in a FELA case is not immediately advantaged by a ruling that it may subtract from the judgment the amount of RRTA taxes plaintiff would have owed on the wages he lost. Any such amount withheld by the railroad must be submitted to the IRS, along with the somewhat larger amount the railroad would have owed as its share. 26 U.S.C. §3202(a); 26 C.F.R. §31.3202-1(a). *See* Pet. Br. 11 (discussing amounts paid to the IRS by Petitioner in this case). What concerns trial lawyers is that railroad defendants will weaponize the rule for use in settlement negotiations.

Amicus AAR argues that taxation of such awards is required to assure stable funding for retirement benefits paid out to railroad workers. Petitioner asserts that the "nation's railroads have a long-term interest in the stability and adequate

funding of the rail retirement system." Pet. Br. 1. Petitioner asserts that the non-taxability of FELA lost income awards results in a railroad retirement system that "is asymmetrical and inherently unstable." *Id.* The AAR cautions that the non-taxability rule has "grave implications for the railroad retirement system." AAR Br. 10. Ultimately, AAR warns, "additional funding will be required to keep the systems in financial balance." *Id.* at 21.

There is no indication that non-taxation of FELA awards, which has been the prevailing rule, has undermined that system. The Board's latest report indicates that Tier 1 and Tier 2 taxes totaled $5.9 billion in FY 2016. United States Railroad Retirement Board, *2017 Annual Report*, 7 (2017), *available at* https://www.rrb.gov/sites/default/files/2017-09/2017AnnualReport.pdf.

Since 2002, funds not needed immediately for benefit payments or administrative expenses have been invested by an independent National Railroad Retirement Investment Trust. The latest report by the RRB notes that as of September 30, 2016, the net asset value of trust-managed assets was $25.1 billion, an increase of more than $500 million over the previous year. *Id.* at 14. Again, the decision to increase RRTA taxes is reserved exclusively to Congress.

More to the point, in the real world of FELA settlement negotiations, the taxability rule threatens both to undercompensate injured plaintiffs and

to deprive the railroad retirement system of Tier 1 and Tier 2 taxes.

B. RRTA Taxation of FELA Awards Will Impede Fair Settlement Negotiations and Reduce Funding for Railroad Retirement Benefits.

The rule Petitioner and supporting amici seek will arm railroads with a potent weapon for use in settlement negotiations with injured workers. Under such a rule, the portion of a damage award designated as past lost wages would be subject to RRTA taxes, which the defendant would deduct from payment in satisfaction of the judgment. If the jury does not designate the portion of the award that is for lost wages, under Petitioner's rule, the entire award would be subject to RRTA taxes. *E.g.*, *Phillips*, 853 N.W.2d at 645 ("we hold the entire amount of the [general] verdict in this case should be considered payment for time lost"); *Heckman*, 837 N.W.2d at 539 (similar).

Most claims, however, end in settlement. In that instance, the parties can agree on how much of the settlement, if any, is allocated to lost past income. "Where there is an express allocation in the settlement agreement between the parties, it will generally be followed in determining the allocation for Federal income tax purposes." *Healthpoint, Ltd. v. C.I.R.*, 102 T.C.M. (CCH) 379, 2011 WL 4550112, at *4 (T.C. 2011).

Under the rule sought by Petitioner, the railroad can use the prospect of RRTA tax liability to pressure the plaintiff into foregoing a jury trial and agreeing to accept a lower settlement offer. If the plaintiff is willing to accept a lower settlement, the railroad may agree to designate only a small amount of the settlement as payment for past lost wages, reducing or eliminating the tax liability. Indeed, this is the settlement tactic complained of by plaintiff's counsel but implicitly approved by the court in *Liberatore*, 140 A.3d at 31-32. As described by a forensic economist who has testified for both plaintiffs and defendants in FELA cases, "[i]n the poker game of the settlement process," the RRTA taxability rule ensures that "the railroad holds the best hand." Ireland, *supra*, at 78. The author further suggests that the rule also enables the railroad to threaten an injured worker's disability payments. *Id.* at 77-78.

Importantly, to the extent that plaintiffs accept lower settlement offers with little or no amounts allocated to lost wages, the railroad retirement system will receive little or no tax revenue from such settlements. The rule invites the railroad to offer a settlement under which neither the plaintiff's share nor the railroad's share of RRTA taxes will be remitted to the IRS. Moreover, the parties may enter into a settlement even after a jury verdict. Ireland, *supra*, at 78. Despite the expressed concerns by Petitioner and the AAR regarding the stability of future funding of retirement benefits for railroad workers, the tax rule's primary outcome will be to

enable negligent railroads to extract lower settlements from FELA claimants while adding no RRTA taxes to the retirement system.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the decision of the Eighth Circuit Court of Appeals to deny BNSF's Motion for Collateral Source Offsets for railroad retirement taxes.

Respectfully submitted,

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September 17, 2018